

June 4, 2003

Jennifer K. McCain, Asst. City Attorney
City of Escondido
City Attorney's Office
201 North Broadway
Escondido, CA 92025

Re: Your Request for Advice
Our File No. I-03-021

Dear Ms. McCain:

This letter is in response to your request for advice on behalf of Councilmember Marie Waldron regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTION

May Councilmember Waldron participate in a decision to change the boundaries of the Downtown Business Improvement District ("DBID")?

CONCLUSION

It is presumed that the council member has a conflict of interest and may not participate in this decision. However, if the decision will not have any effect on the factors listed in regulation 18705.2(a)(2), this presumption is rebutted.

FACTS

We have received the following facts pertaining to Escondido Councilmember Marie Waldron from your incoming correspondence and phone conversations between you and the council member.

Councilmember Waldron owns a business in partnership with her husband. The business is called, "Top End Tees and Apparel" ("Top End Tees") and is located downtown within Escondido's Downtown Business Improvement District ("DBID"). Top End Tees is a sole proprietorship with gross annual receipts less than \$500,000.00.

A former city council created the DBID on October 2, 1991, by adopting Ordinance No. 91-37 pursuant to the terms and authority of Streets and Highway Code § 36500 et seq. The City of Escondido collects annual assessments from businesses within the DBID at the same time business licenses are renewed. The city withholds business licenses if assessments are not paid.

The assessment schedule is adopted annually by city council resolution. The assessment funds are forwarded to the Downtown Business Association ("DBA") which is responsible for spending the money to benefit the DBID. DBA is a 501(c)(6) nonprofit agency. In addition to the assessments, the DBA also receives general funds from the City of Escondido on an annual basis. The DBA's 2002

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

Annual Report indicates that it uses the DBID to fund community events such as a weekly Farmers Market, Cruising Grand nights during the summer, and a banner program. The DBA also provides input on a variety of design and planning projects in the DBID.

The DBID encompasses 878 businesses, which is approximately 16% of the total businesses within the city. The current city council may modify the DBID by changing: (1) the boundaries of the district, (2) the basis and method of levying the assessment, or (3) the classification of businesses subject to the assessment. The city council may also disestablish the DBID.

Specifically, the city council will consider a request from the Mercado Business Association (“MBA”) to have the DBID boundaries realigned to exclude businesses in the MBA. A decision to exclude these businesses would decrease the amount of assessments collected by a little over \$2,000 since the MBA contains approximately 13 businesses. Top Ends Tees is not located in an area that would be affected by this boundary change.

You are unable to provide specific information about the other proposed decisions you have noted. As such, you request formal advice only with regard to the decision to change the district boundaries as described above.

Councilmember Waldron’s business site is leased on an annual basis. Councilmember Waldron was assessed \$150.00 on October 31, 2002, by the City of Escondido. Councilmember Waldron has at least two clients in the DBID, the DBA itself and AIKIDO Escondido. Top End Tees received income of \$120.00 from AIKIDO Escondido and received income over \$14,000 from the DBA. The DBA has gross annual receipts greater than \$140,000 but less than \$1,000,000. The DBA received at least \$140,000 last year from assessments collected from businesses in the DBID in addition to funding from the general fund and other sources. In addition, Top End Tees has a six-month contract with the DBA for exclusive rights on t-shirts. The value of this contract is estimated between \$16,000 – \$20,000. A change in the boundaries of the DBID could potentially affect the contract that Top End Tees has with the DBA if the boundary change impacts the viability of the DBA.

Your research has revealed that AIKIDO Escondido does not meet the financial criteria described in materiality regulation 18705.1(c)(1) – (c)(3) and instead is covered by the materiality standards of regulation 18705.1(c)(4).

ANALYSIS

The primary purpose for the conflict-of-interest provisions of the Act is to ensure that “[p]ublic officials, whether elected or appointed, [should] perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (Section 81001(b).) In furtherance of this goal, section 87100 of the Act prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

Determining whether a conflict of interest exists under section 87100 requires analysis of the questions outlined below.²

Steps One and Two: Is Councilmember Waldron considered a “public official” and is she making, participating in making, or influencing a governmental decision?

Marie Waldron is a public official subject to the conflict-of-interest provisions of the Act. (Section 82048; regulation 18701(a).) She will “make a governmental decision” if she votes on a decision to change the DBID boundaries. Additionally, if she engages in any of the actions described in enclosed regulations 18702.2 and 18702.3 with regard to this decision, she will “participate in making” or “influence” that decision.

² These questions are based on the Act’s conflict-of-interest analysis provided at regulation 18700(b).

Step Three: What are Councilmember Waldron’s economic interests — the possible sources of a conflict of interest?

Section 87103 provides that a public official has a “financial interest” in a governmental decision “if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family,” or on any of the official’s economic interests, described as follows:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment ³ of \$2,000 or more (section 87103(a); regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (section 87103(d); regulation 18703.1(b));
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (section 87103(b); regulation 18703.2);
- A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (section 87103(c); regulation 18703.3);
- A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to \$340 or more within 12 months prior to the decision (section 87103(e); regulation 18703.4);
- A public official has an economic interest in his or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule (section 87103; regulation 18703.5).

Based on your facts, Councilmember Waldron has an economic interest in her business, Top End Tees, provided she has a direct or indirect investment of \$2,000 in this business entity. She also has economic interests in the DBA, a source of income to her, since she has received \$500 or more from this entity over the last 12 months. She does not have an economic interest in AIKIDO Escondido since she only received \$120 from this entity.

In addition, the Act defines “interest in real property” to include:

“...any leasehold, beneficial or ownership interest or an option to acquire such an interest in real property located in the jurisdiction owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family if the fair market value of the interest is two thousand dollars (\$2,000) or more....” (Section 82033.)

Therefore, Councilmember Waldron has an economic interest in the real property on which her business is located by virtue of her annual lease.⁴

³ An indirect investment or interest means any investment or interest owned by the spouse of an official or by a member of the official’s immediate family, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official’s immediate family, or their agents own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.) “Immediate family” is defined at section 82029 as an official’s spouse and dependent children.

⁴ The term “leasehold interest” as used in section 82033 does not include the interest of a tenant in a periodic tenancy of one month or less. (Regulation 18233.)

Step Four: Are Councilmember Waldron's economic interests directly or indirectly involved in the governmental decision?

Business Entity (Top End Tees)/Nonprofit Entity (DBA)

A business entity is directly involved in a decision before an official's agency when that person, either directly or by an agent:

- “(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;
- (2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.” (Regulation 18704.1(a).)